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Gan Boon Aun v Deputy Public Prosecutor

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HIGH COURT (KUALA LUMPUR) — NOTICE OF MOTION NO WA-44–191–12 OF 2017
AZMAN ABDULLAH J
15 JANUARY 2018

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Constitutional Law — Legislation — Validity and constitutionality — Applicant applied to sessions court to refer two questions of law to Federal Court — Application dismissed by sessions court judge — Applicant filed application for revision of sessions court decision — Whether s 122(1) of the Securities Industry Act 1983 violated arts 5(1) and 8(1) — Whether sessions court correct in dismissing application to refer questions of law to Federal Court — Whether questions of law had been dealt with by Federal Court — Whether application to revise decision of learned sessions court judge worthy of revisionary power vested on High Court — Courts of Judicature Act 1964 s 30(1) — Federal Constitution arts 5(1) & 8(1) — Securities Industry Act 1983 s 122(1)

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The applicant applied to the sessions court to refer two constitutional questions to the Federal Court under s 30(1) of the Courts of Judicature Act 1964 ('the CJA'). The said questions were: (a) whether s 122(1) of the Securities Industry Act 1983 ('the SIA') violated arts 5(1) and 8(1) of the Federal Constitution ('the Constitution') in that a director, chief executive officer, officer or representative of the body corporate may be deemed to have committed an offence even where the body corporate was not charged with and not found guilty of any offence under the SIA; and (b) whether s 122(1) of the SIA which enabled a corporation to be found guilty of an offence under the said Act without being charged for the offence in question was violative of art 5(1) of the Constitution and was therefore void. The sessions court dismissed the applicant's application on a sole basis that both questions had been dealt with by the Federal Court. It ought to be noted that prior to the said decision by the sessions court, there were five constitutional issues in the case that were referred by the High Court to the Federal Court. The Federal Court in the said reference application had upheld the validity of s 122(1) of the SIA. The present application for revision ('the applicant's application') was filed by the applicant against the decision of the sessions court in dismissing the applicant's application. The issue for determination was whether the applicant's application to revise the decision of the learned sessions court ('the SCJ') judge was worthy of revisionary power vested on the High Court.

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Held, dismissing the applicant's application:

(1) The sole basis for the dismissal of the applicant's application by the learned SCJ was that both questions had been dealt with by the Federal Court. The said basis was in accordance with the Federal Court decision in *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265. By perusing the surface of the two issues raised by the applicant and the decision by the Federal Court, the court found that the constitutional question had been dealt by the Federal Court and hence no merits for the court to call up the case for revision. Based on the said findings, the court rejected the application for revision either under s 35 of the CJA or s 323 of the Criminal Procedure Code (see paras 15, 23 & 25–26).

[Bahasa Malaysia summary

Pemohon telah memohon kepada mahkamah sesyen untuk merujuk dua persoalan perlembagaan kepada Mahkamah Persekutuan di bawah s 30(1) Akta Mahkamah Kehakiman 1964 ('AMK'). Persoalan-persoalan tersebut adalah: (a) sama ada s 122(1) Akta Perindustrian Sekuriti 1983 ('APS') telah melanggar perkara-perkara 5(1) dan 8(1) Perlembagaan Persekutuan ('Perlembagaan') di mana seorang pengarah, ketua pegawai eksekutif, pegawai atau wakil badan korporat boleh dianggap telah melakukan kesalahan walaupun di mana badan korporat tidak dituduh dan tidak didapati bersalah untuk apa-apa kesalahan di bawah APS; dan (b) sama ada s 122(1) APS yang membolehkan suatu perbadanan didapati bersalah untuk kesalahan di awah Akta tersebut tanpa dituduh kerana kesalahan yang dipersoalkan adalah melanggar perkara 5(1) Perlembagaan dan oleh itu tidak sah. Mahkamah sesyen telah menolak permohonan pemohon atas satu-satunya asas bahawa kedua-dua persoalan itu perlu dikendalikan oleh Mahkamah Persekutuan. Ia perlu ditekankan bahawa sebelum keputusan tersebut oleh mahkamah sesyen, terdapat lima isu perlembagaan dalam kes yang dirujuk oleh Mahkamah Tinggi kepada Mahkamah Persekutuan. Mahkamah Persekutuan dalam permohonan rujukan tersebut telah mengekalkan kesahan s 122(1) APS. Permohonan ini untuk semakan semula ('permohonan pemohon') telah difailkan oleh pemohon terhadap keputusan mahkamah sesyen yang menolak permohonan pemohon. Isu untuk ditentukan adalah sama ada permohonan pemohon untuk menyemak semula keputusan hakim mahkamah sesyen ('HMS') yang bijaksana layak diberikan kuasa semakan semula yang terletak pada Mahkamah Tinggi.

Diputuskan, menolak permohonan pemohon:

(1) Asas tunggal untuk penolakan permohonan pemohon oleh HMS yang bijaksana adalah bahawa kedua-dua persoalan tersebut perlu dikendalikan oleh Mahkamah Persekutuan. Asas tersebut adalah menurut keputusan Mahkamah Persekutuan dalam kes *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265. Dengan meneliti pada dasarnya dua isu yang ditimbulkan oleh pemohon dan keputusan oleh Mahkamah

Persekutuan, mahkamah mendapati bahawa persoalan perlembagaan telahpun dikendalikan oleh Mahkamah Persekutuan dan justeru tiada merit untuk mahkamah memanggil kes itu untuk semakan semula. Berdasarkan dapatan tersebut, mahkamah menolak permohonan untuk semakan semula sama ada di bawah s 35 AMK atau s 33 Kanun Tatacara Jenayah (lihat perenggan 15, 23 & 25–26).]

Notes

For cases on validity and constitutionality, see 3(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 3164–3165.

Cases referred to

Gan Boon Aun v PP [2016] 4 MLJ 265; [2016] 6 CLJ 647, FC (refd)
Ooi Poh Suan & Ors v PP [1984] 2 CLJ Rep 311, HC (refd)
PP v Gan Boon Aun [2017] 3 MLJ 12; [2017] 4 CLJ 41, FC (refd)

Legislation referred to

Courts of Judicature Act ss 30, 30(1), 31, 35, 84(4), 85
Capital Markets and Services Act 2007
Criminal Procedure Code ss 323, 324, 325, 326, 327
Federal Constitution arts 5(1), 7(2), 8(1), 121
Rules of the Federal Court 1995 r 137
Securities Industry Act 1983 (repealed by the Capital Markets and Services Act 2007) ss 86, 86(b), 122, 122(1), 122B(a)(bb), 122C

Gopal Sri Ram (Tan Hock Chuan, Cains Tan, David Yii and Damien Chan with him) (Tan Hock Chuan & Co) for the appellant.
Shanti Geoffry (Mohd Hafiz and Munira Massod with her) (Deputy Public Prosecutor, Securities Commission) for the respondent.

Azman Abdullah J:

INTRODUCTION

[1] This is an appeal by the applicant/appellant against the whole decision by the High Court dated 15 January 2018. On 15 January 2018, this court dismissed applicant/appellant's application to revise a decision made by the sessions court judge dated 30 November 2017 in which the sessions court judge dismissed applicants application to refer two constitutional questions to the Federal Court under s 30(1) of the Courts of Judicature Act ('the CJA'). The said questions were as follows:

(a) whether s 122(1) of the Securities Industry Act 1983 violates arts 5(1) and 8(1) of the Federal Constitution in that a director, chief executive officer, officer or representative of the body corporate may be deemed to

A have committed an offence even where the body corporate is not charged with and not found guilty of any offence under the said Act? and

(b) whether s 122(1) of the Securities Industry Act 1983 which enables a corporation to be found guilty of an offence under the said Act without it being charged for the offence in question is violative of art 5(1) of the Federal Constitution and is therefore void?

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BACKGROUND OF THE CASE

C **[2]** It is obligatory for this court to introduce the background of the case beforehand. The applicant, Director of Transmile Group Bhd, were charged at the sessions court on 12 July 2007 with the commission of offences under the Securities Industry Act 1983 ('the SIA') (since repealed by the Capital Markets and Services Act 2007). The principal charge was for making a misleading D statement in a material particular in Transmile Group Bhd's report, thereby committing an offence under s 86(b) read together with s 122C of the SIA, whilst the alternative charge was that Transmile Group Bhd had committed an offence when it, with intent to deceive, furnished a misleading statement to Bursa Malaysia Securities Bhd in Transmile Group Bhd's report and that the E applicant/appellant as the director, were deemed to have committed an offence under s 122B(a)(bb) read together with s 122(1) of the SIA. On 16 March 2011, at the close of the prosecution's case, the trial court acquitted the applicant/appellant of the principal charge but ordered for defence to be entered on the alternative charge. However, the applicant/appellant raised the F objection to the alternative charge, contending that it was unconstitutional and was therefore null and void by reason of the deeming provision in s 122.

[3] The applicant/appellant on 21 June 2011 successfully applied, pursuant to s 30 of the Courts of Judicature Act ('the CJA'), to refer to the High G Court the question of whether s 122(1) of the SIA violates arts 5(1) and 8(1) of the Federal Constitution ('the Constitution'). The High Court on 14 November 2011 ruled that s 122(1) was unconstitutional and acquitted the respondent and Khiudin. On appeal, which was lodged only against the applicant/appellant, the Court of Appeal on 28 September 2015 held that H s 122 was Constitutional. However, the Federal Court on 10 March 2016 held only the Federal Court has the jurisdiction in a s 30 of the CJA reference to determine a question as to the effect of any provision of the Constitution; the High Court had no jurisdiction to decide on the question or to acquit the respondent; and the Court of Appeal had no jurisdiction to hear the so called I 'appeal' against the decision made by the High Court.

[4] Hence, on 10 March 2016, the Federal Court struck out what it held was an incompetent appeal, set aside the orders of the High Court and Court of Appeal and remitted the matter back to the High Court. Pursuant to the

order of the Federal Court, the High Court, under sub-s 84(4) and s 85 of the CJA, framed and referred the following 'Constitutional issues' to this court for determination: (i) whether s 122(1) of the SIA violates arts 5(1) and 8(1) of the Constitution on the basis that it abrogates the fundamental right of an accused person to be presumed innocent until proven guilty; (ii) whether s 122(1) of the SIA violates arts 5(1) and 8(1) of the Constitution on the basis that it abrogates the fundamental right of an accused that a criminal charge must be proven by the prosecution against the accused beyond reasonable doubt; (iii) whether s 122(1) of the SIA violates art 121 of the Constitution and the doctrine of separation of powers on the basis that it usurps the judicial powers of the court by deeming that a Director, chief executive officer or representative of the body corporate has committed an offence where an offence has been committed by the body corporate; (iv) whether the continued prosecution of the accused for the alternative charge under s 122(1) of the SIA after his acquittal on the principal charge under s 86 of the SIA was in violation of art 7(2) of the Constitution; and (v) whether an arbitrary and indiscriminate use of s 122(1) of the SIA as alternative charge in this case was inconsistent with art 8(1) of the Constitution.

[5] On 15 March 2017, the Federal Court unanimously upheld the validity of s 122(1) of the SIA and ordered the matter to be remitted to the sessions court for continuation of the trial. Pursuant to the order by the Federal Court, the applicant/appellant filed an application under r 137 of the Rules of the Federal Court 1995 to review and set aside the decision of the Federal Court on 15 March 2017 in which the Federal Court dismissed the application on 21 June 2017.

[6] The case was then fixed for the hearing of the defence case before the sessions court judge on the 24 October 2017. However on the same date, an application was made by the applicant/appellant for another referral of constitutional questions to the High Court under s 30(1) of the CJA. The proposed questions were as follows:

(a) whether s 122(1) of the Securities Industry Act 1983 violates arts 5(1) and 8(1) of the Federal Constitution in that a director, chief executive officer, officer or representative of the body corporate may be deemed to have committed an offence even where the body corporate is not charged with and not found guilty of any offence under the said Act? and

(b) whether s 122(1) of the Securities Industry Act 1983 which enables a corporation to be found guilty of an offence under the said Act without it being charged for the offence in question is violative of art 5(1) of the Federal Constitution and is therefore void?

[7] The reason for the application was mainly that Transmile was never charged for the offence under s 122B(a)(bb) of the SIA. There are therefore new constitutional questions that have to be referred to the High Court since this fact was never considered or decided by the Federal Court as this was not one of the five constitutional questions referred by the High Court to the Federal Court.

[8] On 30 November 2017, the sessions court judge dismissed the applicant/appellant's application based on the basis that the questions posed have already been dealt by the Federal Court. The revision before this court was an application by the applicant/appellants to revise the decision of the learned sessions court judge on the said date.

GROUNDS OF DECISION

[9] This court chose not to interfere with the sessions court's order. I have no reasons to do so. The learned sessions court judge had judiciously exercised his discretion by dismissing applicant/appellants' application.

[10] The proposed constitutional questions sought to be referred to the High Court by the appellant/applicant involved the issue of validity of s 122(1) of the Securities Industry Act that reads:

> 122 Offences by bodies of persons and by employees and agents
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> (1) Where an offence against this Act or any regulation made thereunder has been committed by a body corporate, any person who at the time of the commission of the offence was a director, a chief executive officer, an officer or a representative of the body corporate or was purporting to act in such capacity, is deemed to have committed that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

[11] The five constitutional questions referred by the High Court on 9 May 2016 had already been heard and dealt with by the Federal Court on 15 March 2017.

[12] YA Tan Sri Jeffrey Tan in delivering the Federal Court's decision in *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12; [2017] 4 CLJ 41 reiterate as follows:

> It could only be that presumptions and reverse onus clauses are not prohibited by art 5 of the Federal Constitution. As such, it was futile to contend that s 122(1) was unconstitutional because of the presumption and reverse onus clause. *Section 122(1) would be unconstitutional only if it lacked overall fairness. But no*

attempt was made by either party to show how s 122(1) had or had not gone beyond the permissible limits and or had or had not unjustifiably infringed the presumption of innocence. Since it was not shown to be otherwise, the presumption in favour of constitutionality could not have been rebutted. *But such a ruling would leave the 'Constitutional issues' without resolution.* A s 84 reference should be answered by the Constitutional court. There should be a ruling on the constitutionality or otherwise of the presumption and reverse onus clause in the said s 122(1) in particular and of comparable presumptions and reverse onus clauses in general. That would first require a consideration of the aim of the SIA.

[48] The long title and preamble of the SIA proclaimed that the SIA is 'An Act to make provisions with respect to stock exchanges and other persons dealing in securities, and for certain offences relating to trading in securities, and for purposes connected therewith'. And just as proclaimed, Parts III–VII of the SIA provided the law that governed the establishment and operation of stock exchanges and clearing houses and the licensing of persons dealing in securities, while Parts IX–X of the SIA created offences relating to false trading, market rigging transactions, stock market manipulations, false or misleading statements to influence the market, and, manipulative and deceptive devices to fraudulently induce persons to deal in securities. The evident aim of the SIA was to regulate the industry, to promote public confidence in the integrity of the stock market, and to punish violators with Criminal and Civil liability. Section 88B of the SIA provided that 'A person who contravenes or fails to comply with ss 84, 85, 86, 87, 87A or 88 commits an offence and is liable on conviction to a fine of not less than one million ringgit and to imprisonment for a term not exceeding ten years'. Conviction was punishable with fine and imprisonment, not fine or imprisonment. But only individuals could be locked up. A corporate could not be locked up. If individual Directors and or officers were not indicted, the punishment of fine and imprisonment could not be imposed. But was it reasonable that individual Directors and or officers be held accountable for the crimes and or negative behaviour of the corporate? After all, a corporate has a separate legal personality from its Directors and officers. But a corporate is a legal fiction. In reality, all activities of a corporate are managed by its Directors and or officers. Crimes and offences of a corporate could not come about without the acts and or defaults of its Directors and or officers. In the case of offences against the SIA, the actual violators would be the Directors and or officers who would not be deterred by fines imposed on a corporate. Moreover, a fine imposed on a corporate would only penalise innocent investors. Actual violators must be deterred to promote public confidence in the integrity of the stock market. And actual violators would not be deterred if they had no personal liability. As such, it only made good sense that s 122(1) provided that Directors and or officers shall be deemed to have committed the offences committed by the corporate 'unless ...'. To achieve the aim of the SIA, the offence of the corporate must be attributed, only rightly so, to its human operatives, namely to its Directors and or officers. That presumption was not only fair but was also absolutely necessary to protect the stock market. There should be no issue about that. The real concern should be whether the presumption and reverse onus clause in s 122(1) made any unreasonable inroad on the presumption of innocence.

[49] The presumption of innocence requires the prosecution to prove the guilt of an accused beyond all reasonable doubt. Section 122(1) provided that 'where an

offence against this Act or any regulation made thereunder has been committed by a body corporate, any person who at the time of the commission of the offence was a Director, a chief executive officer, an officer or a representative of the body corporate or was purporting to act in such capacity, is deemed to have committed that offence unless …'. The offence against the Act or regulation must be proved to have been committed by the corporate before it could be deemed that the offence was committed by its Directors and or its officers. In short, the corporate offence must be first proved before the presumption could be triggered against the Directors and or officers. Yes, s 122(1) provided that Directors and or officers of the corporate shall be deemed to have committed the corporate offence. But there was no Let-up in the burden or standard of proof. It remained that the prosecution had to prove the offence beyond all reasonable doubt before the deeming provision could be triggered. There was no displacement of the presumption of innocence as contended.

[50] *As said, the deeming provision was fair and necessary. There was no merit in the argument that s 122(1) deemed B guilty of an offence committed by A. Guilt was never deemed or presumed. Section 122(1) only deemed that B committed the offence committed by A, because only B could have caused or motivated the offence committed by A 'unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances'.* It was contended that the 'unless proviso' placed the onus on B to prove the excusing factors to avoid punishment. But that could not be further from the truth. For rather than 'placed the onus on B to prove the excusing factors to avoid punishment', the section gave opportunity to B to rebut the deeming provision, by providing a statutory defence. And in relation to the matters stated in the statutory defence, namely the absence of knowledge, consent or connivance of the Directors or officers, they were matters clearly within the sole knowledge of the Directors and or officers. It should not be difficult for B to prove the absence of his knowledge, consent or connivance. On the other hand, it could not be easy for the prosecution to prove that the offence was committed by the corporate with the knowledge, consent or connivance of particular Directors and or particular officers. It was only fair that the matter of absence of knowledge, consent or connivance should be proved by the accused. In any event, it was a statutory defence, and no prosecution has the onus to prove a defence, statutory or otherwise.

[51] The 'third thing' that s 122(1) was said to have done was that it adjudicated on the guilt of B, and in that sense, because it was adjudicatory and not evidential, it was contended that it breached the doctrine of the separation of powers. That contention, with respect, was bereft of merit. For it is plain as a pikestaff that s 122(1) was just an offence creating provision. Adjudication of guilt or innocence was left to the court with freedom to decide. If it were true that s 122(1) adjudicated on guilt, then the respondent would not be tried at the trial court. For if so, then the respondent would have been sentenced, the moment it was proved that the corporate committed the offence. But his defence was called. Section 122(1) gave the opportunity to the respondent to rebut the presumption that he committed the offence committed by the corporate. In point of fact, guilt or innocence has yet to be decided, pending the defence of the respondent. Section 122(1) could not be adjudicatory as contended.

[13] This court shall compare the two sets of constitutional questions as per the table below:

Constitutional questions posed by the High Court on 9 April 2016	Constitutional questions posed to the sessions judge on 30 November 2017
(1) whether s 122(1) of the Securities Industry Act 1983 ('the SIA 1983') violates arts 5(1) and 8(1) of the Federal Constitution on the basis that it abrogates the fundamental right of an accused person to be presumed innocent until proven guilty?	(1) Whether s 122(1) of the Securities Industry Act 1983 violates arts 5(1) and 8(1) of the Federal Constitution in that a director, chief executive officer, officer or representative of the body corporate may be deemed to have committed an offence even where the body corporate is not charged with and not found guilty of any offence under the said Act?
(2) whether s 122(1) of the SIA 1983 violates arts 5(1) and 8(1) of the Federal Constitution on the basis that it abrogates the fundamental right of an accused that a criminal charge must be proven by the prosecution against the accused beyond reasonable doubt?	(2) Whether s 122(1) of the Securities Industry Act 1983 which enables a corporation to be found guilty of an offence under the said Act without it being charged for the offence in question is violative of art 5(1) of the Federal Constitution and is therefore void?
(3) whether s 122(1) of the SIA 1983 violates art 121 of the Federal Constitution and the doctrine of separation of powers on the basis that it usurps the judicial powers of the court by deeming that a director, chief executive officer or representative of the body corporate has committed an offence where an offence has been committed by the body corporate?	
(4) whether the continued prosecution of the accused in this case for the alternative charge under s 122(1) of SIA 1983 after his acquittal on the principal charge under s 86 of the same Act is in violation of art 7(2) of the Federal Constitution?	

(5) whether an arbitrary and indiscriminate use of s 122(1) of the SIA 1983 as alternative charge in this case is inconsistent with art 8(1) of the Federal Constitution?	

[14] It is to be noted that the new sets of constitutional questions posed to the sessions court judge on 30 November 2017 were questions to challenge the validity of s 122(1) of the Securities Industry Act 1983.

[15] The Federal Court had considered and discussed in great details on this particular issues thus warranting this court with nothing but to adhere to the said decision of the apex court.

[16] What is now left for this court to consider is whether the applicant/appellant's application to revise the decision of the learned session's court judge is worthy of the revisionary power vested upon this court.

[17] The revisionary powers of a High Court judge is found in s 31 of the Courts of Judicature Act 1964 and ss 323–327 of the Criminal Procedure Code. It is indeed a discretionary power of the High Court.

[18] Section 31 of the Courts of Judicature Act 1964 states:

> 31 Revision of criminal proceedings of subordinate courts
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> The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with any law for the time being in force relating to criminal procedure.

[19] Whilst ss 323–327 of the CPC stipulates:

> 323 Powers to call for records of subordinate Courts
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> (1) A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court.
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> (2) Orders made under sections 97 and 98 are not proceedings within the meaning of this section.
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> 324 Power to order further inquiry
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> (1) On examining any record under section 323 or otherwise, a Judge may direct the Magistrate to make, and the Magistrate shall make, further inquiry into any complaint which has been dismissed under section 135, or into the case of any accused person who has been discharged.

(2) Section 303A shall apply for the construction of subsection (1).

325 Powers of Judge on revision

(1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.

(2) No order under this section shall be made to the prejudice of the accused unless he has had on opportunity of being heard, either personally or by advocate, in his own defence.

(3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction.

326 Permission for parties to appear

No party has any right to be heard, either personally or by advocate, before a Judge when exercising his powers of revision: Provided that the Judge may, if he thinks fit, when exercising such powers hear any party, either personally or by advocate, and that nothing in this section shall be deemed to affect subsection 325(2).

327 Orders on revision

When a case is revised under this Chapter by a Judge he shall certify his decision or order to the Court by which the finding, sentence or order revised was recorded or passed stating, where the finding, sentence or order has been varied, the grounds for such variation; and the Court to which the decision or order is so certified shall then make such orders as are conformable to the decision so certified and, if necessary, the record shall be amended in accordance therewith.

[20] The object for the revisionary power of the High Court is for High Court to be satisfied as to the correctness, legality or propriety of any finding, sentence or order recorded or passed in respect of criminal proceedings and matters in the subordinate courts.

[21] In the present case, the learned sessions court judge had examined the record of the proceedings and dismissed the application by the applicant/appellant as the constitutional questions were already been dealt with by the Federal Court.

[22] In *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265; [2016] 6 CLJ 647, the Federal Court explicitly mentioned:

[33] We would like to state here and advise all sessions court judges and magistrates when dealing with any application made by any party under s 30 of the CJA *to properly ensure that there is merit in such application. It may be just a frivolous application to delay the conduct of the hearing of the trial. If there is no merit in such application the case should proceed to a final conclusion of the trial*. A trial should be

A conducted on a continuous basis without interruption and delay. A trial should not be by instalment. Likewise, High Court judges when presiding to deal with matters brought before them under s 30 of the CJA should act and decide promptly and judiciously whether there is merit in such application. If the matter referred to it does not relate to constitutional issue to be determined by the Federal Court, *it*
B *should be sent back to the transmitting court for speedy disposal of the case*.

[23] The main issue for this court to determine is whether the applicant/appellants application is undeniably bear any merits. The learned sessions court judge decided to dismiss application for the reference of the
C Constitutional questions on a sole basis that both questions have been dealt by the Federal Court. The basis for this dismissal by the learned sessions court judge was in accordance with the Federal Court decision in *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265; [2016] 6 CLJ 647.

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[24] In *Ooi Poh Suan & Ors v Public Prosecutor* [1984] 2 CLJ Rep 311 merit in a case was given a great determination to exercise courts discretion to allow a revision:

I have looked at the record of the proceedings and my conclusion was that the
E learned Magistrate had conducted the hearing admirably well considering the fact that he had to use a town hall as a courthouse to deal with 77 persons. The record stated that the charge was read individually, it was read over, explained and understood and, after which, they all pleaded guilty. It was also on record that the accused understood the nature and consequences of their plea. Here again, I am
F satisfied the appellants had understood the charge. The charge was simply for attending a triad society meeting and it followed closely the wordings of the section. There is therefore *no merit* in the argument that the facts do not constitute the offence.

G **[25]** Looking at the surface of the two issues raised by the applicant/appellant and the decision by the Federal Court, this court finds that the constitutional questions have been dealt by the Federal Court and hence no merits for me to call up the case for revision.

H **[26]** Upon this findings, this court rejected the application for a revision either under s 35 of the Courts of Judicature Act or s 323 of Criminal Procedure Code.

I **[27]** The decision made today by this court and decision by the learned sessions court judge are not going to stop or exhaust the appellant/applicant to further raise it by way of an appeal after the case in the lower court has been concluded.

Applicant's application dismissed.

Reported by Dzulqarnain Ab Fatar